

See
March 4. 1760.

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Unto the Right Honourable the Lords of Council and Session,

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P E T I T I O N
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John Murray Tenant in Fairnyhirst,

18th Nov^r
1760

Humbly sheweth,

THAT the Petitioner's Father, *William Murray*, then Tenant in *Fairnyhirst*, a Farm belonging to *Thomas Pringle* of *Symington*, is said to have accepted a Bill, of this Date, holograph of and drawn upon him by the said *Thomas Pringle*, for the Sum of *L. 10, 10 s. Sterling*, Value instantly delivered in Guineas, payable to the Drawer against the 15th of November then next.

The Lords
adhere

Dec. 16. 1732.

That the said deceased *William Murray* continued to possess the aforesaid Farm, under Mr *Pringle's* Father, till his Death, in the 1738; and thereafter, under Mr *Pringle* himself, (who succeeded to the Estate), till Expiry of his Tack in the 1743, when Mr *Pringle* granted him a new Tack of his Possession for fifteen Years; and, during all those Years, the said *William Murray* paid him his Rent. Nor, indeed, did Mr *Pringle* allow him to be backward: His own Circumstances, it is informed, required punctual Payment; and it appears he took care to exact it, there being still extant a Warrant which he raised and executed against *William Murray* for an Arrear.

That the said *William Murray* died in the 1744, and was succeeded in the Farm by the Petitioner. Soon after, a Clearance was made between Mr *Pringle* and the Petitioner with respect to his Father's Possession; and, in place of the former

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partial Receipts, a Discharge on stamped Paper was granted to the Petitioner of all his bygone Rents: In which Clearance the Petitioner can show that he did not get all the Allowance he was intitled to. The Petitioner afterwards continued to pay Mr *Pringle* his Rent as it fell due; and neither at the Time of the aforesaid Clearance, nor for ten Years after his Entry, was any Notification made to him of the aforesaid Bill. But, in the 1753, Mr *Pringle* having taken some Umbrage at the Petitioner, he thought proper to raise a Process against him, before the Sheriff, concluding for Payment of a far greater Arrear of Rent than was due at the Time, and the full Contents of the Bill. This Process he carried on entirely in absence of the Petitioner, who knew nothing about it. After the first Calling he let it lie over a whole Year; and, in the interim, took Payments of Rent from the Petitioner. At length, in May 1754, he took Decree for Half a Year's Rent, and the Contents of the Bill, deducting L. 5 paid, as marked thereon.

Feb. 24. 1756. That, after all these Proceedings, the Petitioner and Mr *Pringle* counted and cleared for what Rent was due, as appears from his Discharge, of this Date, produced, acknowledging him to have received from the Petitioner "full and complete Payment of all Years and Terms Rents of said Lands due and "preceding the Term of *Martinmas* last by past," and discharging him accordingly.

That the next Term of the Petitioner's Rent falling due at *Whitsunday* 1756, and some Difference happening between him and Mr *Pringle* about Repairs stipulated in the Tack, Mr *Pringle*, in July thereafter, charged him with Horning for Payment of that Rent, and of the Contents of the aforesaid Bills, with the Deduction above mentioned; of which Charge the Petitioner obtained Suspension.

That this Suspension came to be discussed before the Lord *Bankton* Ordinary, when the Petitioner prevailed in the Question as to the Repairs, and Mr *Pringle* acquiesced in the Interlocutors



tors on that Branch of the Cause ; which need not be here resumed.

That, with respect to the Bill, the Lord Ordinary, on the 23d of *February* 1757, pronounced the following Interlocutor. " Finds, That in respect of the long Taciturnity, and of the " Circumstances of the Case, that the Suspender's Father, Ac- " ceptor of the Bill, was Tenant to the Pursuer, and after the " Date of it accounted to him for Rents, Action is only com- " petent on the Pursuer's proving, by the Defender's Oath, " that it consists with his Knowledge, that the Sum in the said " Bill, or Part thereof, is still resting owing."

That, against this Interlocutor, Mr *Pringle* presented a Representation ; to which Answers were made for the Petitioner ; and, upon advising the same, the Lord Ordinary, on the 10th of *February* 1758, " in respect of the peculiar Circumstances of " the Case, refused the Desire of the Representation, and ad- " hered to the former Interlocutor."

That Mr *Pringle* thereupon presented a new Representation, which the Lord Ordinary ordained to be answered ; but the Petitioner having neglected to instruct his Agent and Counsel in due time, no Answers were given in ; and his Lordship was prevailed upon to advise the Representation *ex parte* ; and, upon the 9th of *February* 1759, pronounced this Interlocutor. *Having advised the Representation for Thomas Pringle, of Date 17th February 1758, with John Murray's Answers to a former Representation, (no Answers having been given in to the last), finds, That as it is acknowledged by the Suspender, that his Father, the Acceptor of the Bill in question, died in November 1744 ; and that there is no Discharges of the Rent produced upon a Count and Reckoning betwixt the Charger and him ; and that it is admitted by the Suspender, that he himself made no Payment of any Part of the Bill ; therefore sustains the Charger's Claim thereon, after deducing the Sum marked paid on the Back thereof.*

That, against this last Interlocutor, by which the Lord Ordinary altered the two preceding ones, the Petitioner gave in

a Representation ; which his Lordship ordained to be answered.

That thereafter the Cause was remitted to Lord *Prestongrange*, on account of Lord *Bankton*'s Indisposition ; and his Lordship, on the 20th of *February* instant, pronounced the following Interlocutor. *Having considered this Representation, with the Answers, adheres to the Interlocutor complained of; with this Addition, upon the Pursuer's making Oath, that the Contents of the said Bill drawn by himself are still resting owing, so far as by him claimed in this Process.*

The Petitioner must now humbly crave your Lordships Review of the two last recited Interlocutors, which he humbly hopes will be reversed, and the two first Interlocutors affirmed. And he shall here endeavour to establish these three Points : *1mo*, That all Action on the Bill is lost, by the Charger's Taciturnity during such a Length of Time : *2do*, That the continued Transactions between the Parties during that Time, confirms the Exception to the Debt, and the legal Presumption of Payment or Extinction : And, *3tio*, That these Objections are not taken off by the Receipt of a partial Payment wrote on the Back of the Bill ; nor can be removed by the Charger's Oath, that the Debt, or Part thereof, is still resting owing.

And with respect to the *first* Point, your Lordships will observe, that this Bill bears Date in the 1732, and had no Protest or other Document taken upon it (independent of the pretended Receipt) earlier than the 1754, when the Sheriff's Decree in Absence was obtained, nor Payment demanded till the 1756. Such being the Case, the Petitioner apprehends, that Action upon this Bill is clearly lost and excluded.

Bills are introduced for the Benefit of Commerce ; not as lasting Securities for Debts, but as Bags of Money passing currently from Hand to Hand, without the Formalities and Delays attending other Conveyances. Hence the extraordinary Privileges allowed them are restricted within precise Limits. If not protested within six Months, the Benefit of summary Diligence upon them is cut off ; and though otherwise they may remain
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for some time the Ground of Action, yet it is reasonable and necessary that they should not do so for ever.

By the Laws of our neighbouring Countries, by our Dealings with whom Bills were first introduced, they are confined to a very short Endurance. By the Ordinance made in *France*, anno 1673, Bills prescribe in five Years; and the *English* Statute of Limitations terminates them in six. It is true, no precise Period is fixed for their Prescription by the Law of *Scotland*: But as other holograph Deeds are with us limited to twenty Years, it seems highly expedient, that the Endurance of Bills should not be further extended. Were we to sustain them during the Currency of the long Prescription, we should deviate from the general Practice of Nations, and expose People to many Inconveniencies. All other Deeds and Obligations not holograph of the Granters, must be properly attested. The Designation of Writer and Witnesses, and the Subscriptions of the latter, are required to prevent Forgeries; but are dispensed with in Bills, because Bills are only considered as temporary Securities. While, therefore, Bills are confined to their original and proper Purpose and Endurance, Forgery, when committed, may be subject to Detection: But if Bills upon which no Documents have been taken, nor Diligence done, for a long Course of Years, were to be sustained, no Man could be secure against the Operations of Forgery and Fraud.

On these Principles, our most eminent Writers have given their Opinion, that Action on Bills may be lost by lying over for a considerable Time, though far short of the Years of Prescription. Lord *Stair* says, "That Bills kept up for any considerable Time are not probative." And the learned Author of the new *Institute* states the Doctrine here pleaded for the Petitioner in the clearest and most convincing Terms; and seems to think, that if Bills are not protested, they may be lost, even in less than twenty Years. Book 4. tit. 32.
§ 6.
Book 1. fol. 13.
§ 31.

In the same manner, your Lordships have, in a Variety of Cases, determined this Question. The Petitioner shall only

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notice a few of the many Decisions to this Purpose upon Record.

Thus, in the Case of *Mr Garden of Troup contra Mr Thomas Rigg*, 11th February 1747, a Bill accepted by Mr Rigg in 1712 was objected to by himself, as not probative; as well as another, dated in May 1708: And although the Pursuer produced Letters of Mr Rigg, asking Delays from him of the Payment of a Debt, which could only apply as to those Bills, it was found, "That no Action lay on these Bills, which had lain over for so long a Time without Demand, unless supported by Mr Rigg's Oath upon the Verity of his Subscription to the Acceptance."

Again, in the Case *Wallace contra Lees*, 31st January 1749, the same Objection was made to two Bills, dated April 1722 and December 1724: And although a partial Payment was marked upon one of them, your Lordships found, "That the Bills having lain over so long, and the Granter being dead, there lay no Action upon them." Here your Lordships see the Taciturnity on one of the Bills could not exceed twenty-four Years, and probably was short of that Space.

In a still later Case, *Moncreiff contra Moncreiff*, 13th December 1751, no Action was found to lie upon a Bill dated in the 1719, although it was contended, that Interest had been paid upon it up to the 1732. And, lastly, your Lordships, 20th February 1754, *Lookup contra Crumbie*, found, that no Action could be sustained on a Bill dated in 1724.

From these, and many other Decisions, it appears, your Lordships and your Predecessors have considered Bills in their true and proper Light. You have not established what may be called a Prescription, in the strict Sense of the Word, but have supported the legal Presumption arising from a Taciturnity exceeding twenty Years, That the Bill itself, or Acceptance to it, has been forged, or that Payment of it has been made; seeing no Man possessed of a Security much of the Nature of a Bank-note, can be supposed to have allowed it to lie over for such a Length

Length of Time, without taking Measures for recovering Payment, had it been justly due, or unpaid. This general Presumption more particularly applies to the Charger, who was bred to, and followed the Profession of the Law, long after the supposed Existence of this Debt; and consequently cannot be supposed unacquainted with the Nature of Bills. The Petitioner must further observe, that, in so far as he is acquainted with Decisions on this Point, your Lordships have not repelled the Objection of Taciturnity against any Bill of a greater Age than seventeen Years; which being many Years short of the Taciturnity of the Creditor in this Bill, corroborates the Cases already quoted, in which your Lordships have sustained that Exception beyond twenty Years. In fine, the Petitioner apprehends, that in no Case can the legal Presumption be applied more justly than in the present, more especially when the other Circumstances of it are attended to.

And this leads to the *second* Point proposed by the Petitioner, namely, the Consideration of those Transactions between the Parties, by which he apprehends the legal Presumption is extended to positive Evidence, of the Falsity, or at least of the Payment, of this Bill.

Your Lordships see, that at the Date of it, *William Murray* the Acceptor was Tenant to the Charger's Father: That he continued to be such, till old Mr *Pringle's* Death in the 1738: That thereafter he possessed on his current Tack, under the Drawer of the Bill, till its Expiry in the 1743, when the Charger granted him a new Tack for fifteen Years: That on his Death in the 1744, the Petitioner succeeded to his Effects, and particularly to his Tack, under which he possessed till the 1754, without the least Intimation being made to him of this Bill. That then only a Decreet in Absence was obtained: That during the whole of those Years, both Father and Son paid their Rents, first to old Mr *Pringle*, who was abundantly exact in levying the same, and afterwards to the Charger; for which Numbers of Receipts were granted: That even after the Decreet

1754.

1754, the Charger gave the Petitioner a general Discharge of his Rents, and never insisted for Payment of this Bill, till on Occasion of the Dispute about the Repairs in the 1756, twenty-four Years after its Date. These Facts must carry Conviction with them, either that this Bill was in itself not just, or that it was paid, or remitted by the Creditor. And your Lordships will consider, that in the above Cases, where the legal Presumption was sustained, there was no such Transactions as these between the Parties, corroborative of that Presumption.

Lord *Bankton*, in his Interlocutor of the 9th February 1759, lays some Weight in support of the Bill, on the Circumstances of *William Murray's* having died in November 1744, and that no Discharges of Rent, proceeding on a Count and Reckoning between the Charger and him, were produced. But, with great Deference, the Petitioner's Argument is not thereby weakened. Had his Father died in the 1738, when the Charger succeeded to the Estate, the Presumption of Payment by him would have been less pregnant; but as he lived six Years longer, that Space was certainly sufficient Time for the Charger to make his Demand. But, properly, the whole of the Charger's Taciturnity must be conjoined in this Question. Nor is it more material, that there does not appear any regular Count and Reckoning between the Charger and *William Murray*; for it is sufficient, that it is admitted he paid the Charger his Rent till the Time of his Death; a fitted Account, relative to the Rents alone, would rather have made against than for the Petitioner. Besides, it was certainly most natural for the Charger, on *William's* Death, to have intimated to the Petitioner, as his Representative, that he was possessed of his Father's Bill, had he not then been conscious, that he had no good Claim upon it.

The Charger has objected on this Point, That his granting any Number of Receipts or Discharges for Rent, cannot presume a Discharge of a Bill, more than it would presume a Discharge of a Bond, which would nevertheless subsist for forty Years. But the Petitioner is advised, that even a Bond has been cut
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down on presumptive Evidence of Payment, far within the long Prescription, and particularly in a pretty late Case, between *John Din*, and Again, the Case of a Bond is widely different from that of a Bill, the one being a temporary, and the other a lasting Security. Much less length of Time, therefore, and weaker Circumstances, create a Presumption of Payment of a Bill than of a Bond; though in this Case, it is apprehended, the Circumstances would have even operated sufficiently against such an Obligation.

The Charger likewise contends, That the Bill's remaining in his Custody is *separatim* sufficient to take off any Presumption against it. This seems scarcely to merit an Answer. In all the Cases that have been quoted, and in the whole Argument of our Lawyers on this Point, the Bill is supposed to be in the Creditor's Hands; and nevertheless Action is denied upon it. Had it been in the Petitioner's Custody, there could have been no Room for the Question. An Answer of the same kind seems applicable to another Reason for sustaining the Bill given in Lord *Bankton's* last Interlocutor; namely, that it is admitted by the Petitioner, that he himself made no Payment of any Part of the Bill. The Petitioner denies, he ever knew or heard of the Bill till of late, which is the very Ground of his Objection to it. Had he ever paid a Farthing of it, such Payment would have effectually precluded him from any after Challenge.

The Petitioner comes now to the *third* and *last* Point proposed, the obviating the Charger's Plea, founded on the Receipt of the Charger's Hand-writing on the Back of the Bill, in these Words: "*Edinburgh, March 12. 1744, Received five Pounds Sterling in part of this Bill. J. P.*" That this Receipt had any Weight, either with Lord *Bankton* or Lord *Presington*, does not appear from the Words of the Interlocutors reclaimed against. Indeed, how such a Receipt, wrote by the Creditor and Possessor of the Bill, supported by no other Adminicle, can interrupt Prescription, or preserve Action which would be otherwise lost, the Petitioner cannot conceive. Certain it is, that if

such Receipts could have that Effect, no Obligation could be cut off by the Taciturnity of a thousand Years. A pretended Creditor, who had either forged a Deed, or possessed himself of a Ground of Debt already paid, might preserve it in Force, after all Opportunity of Detection was lost, by entering upon it, with his own Hand, such Receipt for partial Payment as he thought fit. Thus the greater Part of the pretended Debt would be saved from ever prescribing, while the alledged Debtor could know nothing of what was practising against him.

It has been said for the Charger, that the objecting to the Credibility of such Receipts is excluded by the usual Practice of marking partial Payments of Bills in that Manner. This Argument is altogether erroneous. Such Jotting is certainly good against the Holder of the Bill, and is intended to have no greater Effect. The very Nature of the Thing proves it; and not one Example can be pointed out, where a Receipt of this kind was sustained, as *per se* sufficient to preserve the Validity of the Ground of Debt. To the contrary, your Lordships will observe, that, in the late Case already quoted, *Wallace contra Lees*, a partial Payment was marked upon the Bill; and yet your Lordships disregarded the Receipt entirely; and found, that the Bill having lien over so long, (near 24 Years from its Date), and the Granter being dead, there lay no Action upon it.

Such is the precise Case at present. The Petitioner's Father died in *November 1744*; and, consequently, the pretended Receipt, bearing Date in *March* preceding, must apply to him, as the Maker of the Payment; which greatly increases the Suspicion against it, as the Power of Detection is foreclosed by his Death. This Bill was of the same Antiquity with that of *Lees's* before Payment was insisted for; and the other Circumstances against the Bill infinitely stronger. The Petitioner cannot avoid likewise noticing to your Lordships, that, in the Charger's Libel before the Sheriff, no mention was made of any partial Payment, but the full Contents of the Bill concluded for. After the Process was commenced in absence, the Charger let a whole Year slip over, without further Procedure in it; and, in the mean

mean time, accepted of Payments of Rent from the Petitioner: Then he thought fit to take the Sheriff's Decreet for the Sums libelled; and, after that Decerniture, the Extract bears, his Procurator desired, that it should be restricted as to the Bill, by deducing the *L. 5 Sterling* marked on the Back of it; and the Sheriff allowed the Decreet to be extracted accordingly. These Proceedings, it is apprehended, are highly unfavourable for this Receipt. Observations of this Kind cannot be reckoned injurious to Mr *Pringle*, as they are naturally produced by obvious Circumstances. At the same time, the Petitioner apprehends his legal Exception to the Receipt, that, in Law, it cannot be probative against him, is alone sufficient to refute any Argument upon it.

The Petitioner must now, before concluding, take Notice of the Charger's Oath in supplement, which, by the last Interlocutor, is admitted for supporting this Debt.

The Petitioner, with great Deference, must confess, that he cannot discover any Precedent of a Bill, in the like Circumstances, having been supported in this Way; nor indeed of any other Debt, excepting a Merchant's Account. By the first Interlocutors of Lord *Bankton*, the Charger was allowed the Petitioner's Oath of Knowledge, that the Sum in the Bill, or Part thereof, is still resting owing. Even this was an extraordinary Indulgence, as the Petitioner is only the Representative of the alledged Acceptor. Sir *George Mackenzie* observes, on the Act 1669, "That holograph Writs and Subscriptions, without Witnesses, not pursued on within twenty Years, are only to be proven by the Oath of the Subscriber; *so that if the Subscriber die, these Deeds die with him.*" The same Reason operates with equal Force, in the Case of Bills, or rather it is stronger against requiring the Oath of the Acceptor's Representative, than the Oath of the Representative of the Granter of a holograph Bond; because such Bond is, of its Nature, a permanent Security; whereas Bills are the reverse. The Presenter's Oath, on his Belief of the Acceptor's Subscription,

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can be of no Avail: Nor does the Petitioner know an Instance, even of the Representative's Oath being taken on his Knowledge of the Contents being resting owing, as it is impossible for him to depone on such a Point with the same Certainty as the original Debtor might have done. In the Case of Mr *Rigg*, his Oath was indeed required, as being himself the Acceptor; but in the other late Cases of *Wallace*, *Moncreiff*, and *Lookup*, where the alledged Accepters were dead, the Representatives were not required to depone, even on resting owing. The Petitioner, however, readily acquiesced in Lord *Bankton's* Judgment, and is still ready to depone, as his Lordship directed. But he cannot see any Foundation in Law or Equity, for subjecting him in the Payment of this Debt, (which, even discounting the alledged Payment, would now amount to about *L. 20 Sterling*), upon the Oath of the Charger. If the Bill is not otherwise probative, or if in Law it is held as extinguished, the permitting the Charger to supply all these Defects, by his Oath alone, is to make him Judge and Witness on his own Claim; a Measure equally dangerous and unprecedented.

May it therefore please your Lordships, to review and alter the Lord Bankton's Interlocutor of the 9th of February 1759, and Lord Prestongrange's Interlocutor of the 20th of February instant, and to adhere to the Lord Bankton's Interlocutors of the 23d of February 1757, and 10th of February 1758, finding, That no Action can lie on the Bill above mentioned; and with respect thereto, to suspend the Letters simpliciter, and decern.

According to Justice, &c.

DAVID RAE.